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No. 319

In the Supreme Court of the United States

OCTOBER TERM, 1932

UNITED STATES, PETITIONER

v.

ACME OPERATING CORPORATION; LIBERTY TRUST COMPANY, INTERVENOR

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The intervenor's brief contains a number of statements of fact which are not supported by the record. We desire to call attention in this brief to some of the more important of these errors.

On page 9, and again on pp. 13–14 of the intervenor's brief, reference is made to charter hire rates of vessels of the *Whitney* class, and a tabulation of these rates appears as Appendix A at p. 47 of the brief. These statements are based on Finding 25. (R. 44.) But the rates set out in the finding and copied by the intervenor are wholly inapplicable to the vessels here involved. The rates in the finding are expressly stated to be those prevailing in "nations which impose no limitation

with respect to shipping and charter rates," that is, neutral countries, and they are time charter rates, not bare-boat rates.

On page 11 of its brief the intervenor states that "On August 12, 1918, the Shipping Board succeeded, however, in getting the two owning companies to sign and Fidelity Trust Company, through ill advice or improvidently, to join in signing the agreement, a copy of which is annexed to the petition of the Fidelity Trust Company." There is no suggestion in the record of duress, misrepresentation, or other than the fairest and most open dealing in respect of the contract of August 2. Miller and Stafford, and the Acme and Whitney Corporations, had collected over $1,200,000 in freight money, and had expended all except a small part of this sum on account of purchase and enlargement of the vessels (R. 36); and the Trust Company was apprehensive lest the consignors of freight recover what was left of moneys on hand and force the sale of the vessels.[1]

The statement in paragraph (5) on p. 13 of the intervenor's brief must be read in connection with the provisions of the contract of August 12, 1918. By that contract, full compensation was payable, as between the Trust Company and the Government, to the owners. Since the mortgagees had not

[1] This Court had not then decided *Allanwilde Transport Co.* v. *Vacuum Oil Co.*, 248 U. S. 377, and *Texas Co.* v. *Hogarth Shipping Co.*, 256 U. S. 619.

reduced the vessels to possession at the time the requisition charters were executed, the owners were free to operate or let them on such terms and for such compensation as they deemed fit.

The intervenor, at pp. 14–15 of its brief, estimates the cargo carrying capacity of the vessels as being the total of their d. w. t. capacity, due to the necessity of space for fuel, stores, quarters, and so on. The total cargo carrying capacity would obviously have been very materially less than the figure stated.

The tabulation presented by the intervenor at pp. 16–17 of its brief shows a deficiency of about $1,200, the result of a deficiency in security on the *H. N. Whitney* of $128,000 and an excess margin of security in the case of the *J. S. Whitney* of $126,800. But this tabulation includes large sums charged as interest on the mortgages and on the liens. There is no finding relating to interest on the mortgages or showing that there was a default in interest on the part of the mortgagors. Nor is there any reference in the findings to interest after April 27, 1918, in relation to the Valk and Murdock lien on the *J. S. Whitney,* or of interest subsequent to August, 1918, on the Crane lien on the *H. M. Whitney.* Incidentally, there was advanced by the Trust Company on the $200,000 note in the case of the *H. M. Whitney* only $175,000, $25,000, or 12½%, being retained by the Trust Company as a bonus. (Finding 6. R. 31.)

On p. 19 of its brief the intervenor states that after the vessels were returned in July, 1919, "they could be operated only at a net loss." From finding 24, to which reference is made in support of this statement, it appears that the vessels were operated at a loss. But there is nothing in the record to indicate the wisdom or business efficiency of the operation of the vessels by the Trust Company, nor is there a suggestion that proper operation of the vessels would not have resulted in material profits.

The intervenor on p. 23 of its brief objects to the petitioner's argument that the Government was not liable to pay compensation for ordinary wear and tear. Ordinary wear and tear is a necessary incident to the proper use of any property. Here, however, it was expressly provided by the Ninth and Eleventh articles of the charter parties under which the Government operated the vessels, that the Government would not be liable for such wear and tear. The full text of this charter party is set out in Appendix A of this brief. The charter parties appear in full in the stipulation filed in the lower court, and quotations from them are set out in Finding 22. (R. 41.)

The intervenor states at pp. 28–29 of its brief that as a matter of common knowledge the market was rapidly falling when the vessels were released, due to the sudden flooding of the market by the return of requisitioned vessels. This statement is not supported by the record. As a matter of fact and "common knowledge," as evidenced by Fair Play

and other maritime publications, the market for vessels was rapidly rising and continued to rise until the end of the first quarter in 1920, when the all-time peak market value of vessels was reached.

Respectfully submitted.

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JANUARY, 1933.

APPENDIX A

UNITED STATES OF AMERICA

REQUISITION CHARTER

Name of steamship: H. M. Whitney.
Type of steamship: Steel Steamship.
D. W. tonnage: 3,800.
Gross tonnage: 2,707.
Passenger capacity: ——.
Knots per hour: 14½.
Date on which vessel entered into pay: April 27, 1918.

THIS REQUISITION CHARTER made and concluded upon in the District of Columbia as of the 27th day of April, 1918, between Whitney Steamship Corp. of New York, owner of the good American steel Screw Steamship *H. M. Whitney,* of New York, of 2,707 tons gross register and 1,791 tons net register, built in 1890, having engines of 379 nominal horsepower, provided with proper certificate for hull and machinery, and classed A1 Am. Bureau at about 200,000 cubic feet capacity and 3,800 tons dead-weight capacity, summer freeboard, inclusive of permanent bunkers, capable of making an average voyage speed when loaded of 14½ knots an hour, under ordinary conditions, on a consumption of about 45 tons of coal, or about ——— bar-

rels of oil per 24 hours; and the United States of America, through the United States Shipping Board—

WITNESSETH:

Whereas by Requisition Order, dated April 27th, 1918, pursuant to the Urgent Deficiency Act 15 June, 1917, and the President's Executive Order 11 July, 1917, the United States has requisitioned the use of the Steamship *H. M. Whitney,* and the steamship has been delivered into possession of the United States pursuant to the Requisition; and

Whereas it is desired by the United States and by the owner to fix the compensation (hereinafter called hire) which the United States shall pay to the owner for use of the steamship so requisitioned, and to define by agreement the rights and duties of the United States and of the owner with respect to the operation of the vessel under the Requisition, and with respect to other matters in connection therewith:

NOW, THEREFORE, IT IS AGREED AS FOLLOWS:

FIRST. The terms and conditions under which the vessel is to be operated shall be those contained in the "Time Form" hereto annexed; provided, however, that at the time of the Requisition or at any time thereafter, on five days' written notice, the United States may operate the vessel under the terms and conditions contained in the "Bare Boat Form" hereto annexed, such operation to begin when the steamship is in a United States port.

SECOND. In consideration of the compensation provided and the other obligations assumed by the United States hereunder, the owner accepts this Requisition Charter in full satisfaction of any and all claims he has or may have against the United

States arising out of the Requisition and accepts the compensation herein provided for as the just compensation required by law; provided, however, that the acceptance of this Requisition Charter shall be without prejudice to the claims, if any, the owner may have against the United States arising out of recoveries against the owner by third parties on the vessel's commitments.

THIRD. Upon giving five days' written notice to the owner the United States may at any time, when the vessel is in the United States port, cancel this Requisition Charter without prejudice to the accrued rights of either party.

Witness to the signature of—
(Sgd.) WHITNEY STEAM SHIP CORP.,
Owner.

By (Sgd.) R. E. MILLER, *Prest.*
(Sgd.) U. J. GENDRON.

Witness to the signature of—
THE UNITED STATES SHIPPING BOARD,
By (Sgd.) PAUL FOLEY,
Director of Operations.
(Sgd.) U. J. GENDRON.

* * * * *

BARE BOAT FORM

FIRST. The steamship shall remain in the service of the United States under the Requisition Order to be employed as and where the United States may from time to time determine and for such period of time as the United States may determine, but such period shall not extend beyond the first arrival of the steamship in an American port six months

after peace is declared, unless she shall be required for Government purposes. The Vessel, when placed at the disposal of the United States, as directed by it, shall be or shall forthwith be made at the expense of the owner tight, staunch, strong, and well and sufficiently tackled, appareled, furnished, outfitted, and equipped, and in every respect seaworthy and in good running order and condition, and shall be fit for the service in which she has usually been employed, having on her delivery United States Inspection Certificate that the steamship has met all requirements to fit her for the trade in which she is employed at the time of the Requisition, except that no such certificate shall be required if she be a foreign-built vessel not at present subject to the United States Steamboat Inspection laws as provided in the Panama Canal Act, as amended 18 August, 1914. Any deficiency in these respects must be remedied forthwith at the expense of the owner; and any time lost in remedying such deficiency is not to be paid for by the United States.

SECOND. The United States, at its sole expense, shall man, operate, victual, and supply the vessel.

THIRD. The United States shall pay all port charges, pilotages, and all other costs and expenses incident to the use and operation of the vessel.

FOURTH. The United States shall assume war, marine, and all other risks of whatsoever nature or kind, including all risk of liability for damage occasioned to other vessels, persons, or property.

FIFTH. The United States shall pay for the use of the steamship at the monthly rate which shall from time to time be established by the United States Shipping Board for a vessel of her description, commencing on and from the hour when she

shall be ready for delivery under the Requisition (and is so reported to the United States) and at and after the same rate for any part of a month, hire to continue until the hour at which the vessel may be ready for redelivery at a United States port (and is so reported to the owner).

If the United States Shipping Board shall hereafter lower the rate of hire from that in effect on 15 October, 1917, the owner shall have the option of canceling this Requisition Charter as of the date of such reduction, without prejudice to the rights of either party.

Payment of the hire shall be made in the District of Columbia, in cash, monthly, as earned, at the end of each calendar month. If the vessel is lost, hire shall be paid up to and including the date of her loss (if the time of her loss be uncertain, then up to and including the date she is last heard from).

Dead-weight tonnage shall be based on summer freeboard assigned or to be assigned with reference to North Atlantic service, according to the standards of any recognized classification society; proper evidence of such assignment, together with a true copy of the dead-weight scale of the vessel, shall, if possible, be furnished by the owner. Until reasonable opportunity has been afforded the owner to procure such assignment, hire shall be paid on dead-weight tonnage as certified by the owner, any excess or deficiency in such hire to be adjusted upon subsequent determination of summer freeboard.

SIXTH. A certified statement from a recognized classification society that the vessel has been classed as fit for her usual previous service shall, if obtainable at a reasonable cost, be furnished by the owner.

Any alterations which are made to obtain a class for North Atlantic service which are not required to obtain a class for the vessel's previous usual service shall be made by and at the expense of the United States, but there shall be no deduction from the hire for time consumed in making such alterations. So far as the exigencies of the service will permit, the United States shall do all things necessary to maintain the vessel's class.

SEVENTH. The United States shall accept and pay for all fuel and consumable stores in good order and condition on board at the time of vessel's delivery under the Requisition Order, and the owner shall, on redelivery, pay for all such supplies left on board, at the current market price at the respective ports of delivery and redelivery. An inventory of all such supplies shall be furnished forthwith by the owner to the United States for verification.

EIGHTH. The United States shall have the use of all outfit, equipment, and appliances without extra cost, provided same or their substantial equivalent shall be returned to the owner when the vessel is redelivered in the same or as good order and condition as when received, ordinary wear and tear excepted. An inventory of such property shall be furnished forthwith by the owner to the United States for verification.

NINTH. In case of actual or constructive loss as provided in clause "Tenth" due to the operation of a risk assumed by the United States, just compensation for such loss, with interest at 6 per centum per annum, commencing 30 days after the date of such loss, shall be paid by the United States in the District of Columbia, interest not to be paid, however, if the owner resorts to any court for the

purpose of establishing the amount of the just compensation. The United States shall, however, have the option (to be exercised within 90 days after the date of such actual or constructive loss) of delivering to the owner within a year after such loss, in lieu of such payment, a vessel of substantially similar tonnage, type, class, and value, and of substantially no greater age (any deficiency in value to be paid for in cash), paying interest in the meanwhile from the date of loss at the rate of 6 per centum per annum on the value of the lost vessel.

In case of damage (not constituting an actual or constructive loss) due to the operation of a risk assumed by the United States, the vessel shall, at the cost to the United States, be restored to the owner at the expiration of her service under the Requisition, in the same or as good order and condition as that in which she was when delivered to the United States, ordinary wear and tear excepted, or, just compensation for the damage, with interest at 6 per centum per annum, commencing 30 days after proof of such damage upon redelivery of the vessel, shall be paid by the United States in the District of Columbia, interest not to be paid, however, if the owner resorts to any court for the purpose of establishing the amount of the just compensation.

TENTH. If the steamship sustains serious damage or other injury to the extent that the United States shall, without regard to any rule of law, consider her a total loss, the United States shall have the option (to be exercised within 90 days thereafter) of declaring the steamship to be a total loss as of the date of the damage, and of taking over or selling her, and the owner's rights as to compensation shall be the same as provided in clause

"Ninth," interest to commence 30 days after the date of the damage.

ELEVENTH. The United States may at any time remove or alter, at its expense, all or any of the fittings of the vessel, and may erect any new fittings which may be required to render the vessel available for service to the United States, provided that the vessel shall, at the cost of the United States, be restored to the owner at the expiration of her service under the Requisition in the same or as good order and condition as that in which she was when delivered to the United States, ordinary wear and tear excepted, or just compensation for the damage thus occasioned to the vessel, with interest at 6 per centum per annum, commencing 30 days after the proof of such damage upon redelivery of the vessel, shall be paid by the United States in the District of Columbia, interest not to be paid, however, if the owner resorts to any court for the purpose of establishing the amount of the just compensation.

TWELFTH. The United States shall have a lien on the vessel for all moneys paid and not earned or due to the owner and for all advances and overpayments made, and the United States shall have a lien on all cargoes and goods for the payment of freights and charges, including dead freight, demurrage, forwarding charges, charges for carriage to port of shipment, and for general average claims.

THIRTEENTH. Any dispute of law or fact arising under this "Bare Boat Form," except as to the rate of hire and the compensation for actual or constructive total loss of the vessel and except as to matters expressly left to be decided by the United States Shipping Board, shall be referred to the ar-

bitration of three persons, one appointed by the owner, one by the United States, and third by the two so chosen. They may proceed in any manner determined by themselves, and their decision, or that of any two of them, shall be final, and for the purpose of enforcing any award hereunder the agreement may be made a rule of court. Such arbitration shall be a condition precedent to the commencement of any action.

FOURTEENTH. No Member of or Delegate to Congress or Resident Commissioner, nor any person employed by the United States Shipping Board, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom, but under the provisions of section 116 of the act of Congress approved 4 March, 1919, this stipulation, so far as it relates to Members of or Delegates to Congress or Resident Commissioners, shall not extend or be construed to extend to any contract made with an incorporated company for its general benefit.

SPECIAL CLAUSE—PASSENGER SHIP

FIFTEENTH. The owner of a passenger vessel shall permit the use, without extra cost therefor, of all cooking utensils and facilities already aboard the vessel, provided the same or their substantial equivalent be returned to the owner when the vessel is redelivered in as good order and condition as when received, ordinary wear and tear excepted. An inventory of such property shall be furnished forthwith by the owner to the United States for verification.

SPECIAL CLAUSES—TANKERS

SIXTEENTH. The owner guarantees that the tanks are oil tight at the time of delivery.

SEVENTEENTH. To facilities the discharge of oil fuel, the owner shall provide a Y-piece with necessary reducers for each discharge up to the maximum number which can be used simultaneously.

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